Supreme Court, U.S.
FILED

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No._____

IN THE

Supreme Court of the United States

JERRY L. ROBINETT,

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; VETERANS ADMINISTRATION FOR THE U. S. DEPARTMENT OF VETERANS AFFAIRS AND E. ROSS BUCKLEY, JR.

Respondents.

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JERRY L. ROBINETT
In Pro Se
15704 Chef Menteur Hwy.
New Orleans, Louisiana 70129
(504) 254-1431

QUESTIONS PRESENTED FOR REVIEW

1. Whether to establish a uniform standard amongst the circuits for what acts constitutes "intentional or willful" as required under 5 U.S.C. section 552a (g) (4) for there to be a cause of action under the Privacy Act.

2. Whether to interpret if Congress, in enacting Title 38 C.F.R. section 1.511(c) (3) (ii), intended that the Regional Counsel be involved in the investigation that is required under this regulation.

3. Whether to reinstate the suit against all defendants.

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OPINION BELOW

The Fifth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is reported at 83 Fed. Appx. 638 (2003). The District Court did not publish an opinion in this case. Its pertinent rulings from the bench are reprinted in the Appendix at (App. A at App. 1).

JURISDICTION

The Fifth Circuit filed its decision on December 11, 2003. This Court has jurisdiction under 28 U.S.C. sect. 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

5 U.S.C. sections 552a(g)(1)(D); & 552a(g)(4); 552a(e)(8); Also, 38 C.F.R. sections 1.511(c)(3)(ii) & 1.511(d).

The pertinent text of these statutes and regulations will be set out in appendix C.

STATEMENT OF THE FACTS

Prior to this suit, the petitioner, Jerry L. Robinett had filed a suit in a Louisiana district court against State Farm Mutual Automobile Insurance Company (State Farm) for inter alia, the fault of claims adjusters who acted in bad faith in the claims adjustments. Attorney E. Ross Buckley, Jr. was one of two attorneys representing State Farm.

The litigation of this state suit became very contentious over issues of lawyer ethics and as an act of harrassment, attorney E. Ross Buckley, Jr. decided to invade petitioner's medical files at the Veteran's Administration (VA), despite the fact that the amended petition contained no claim for any physical or mental personal injury.

To accomplish this invasion, attorney Buckley made fraudulent misrepresentations about the facts, the pleadings and the law in obtaining an ex parte order from the state Judge for these medical records from the VA. Under Louisiana law, those records were not discoverable and the ex parte court order for them was unlawful.

Alerted to this attempted invasion, Robinett sought to speak to the VA Regional Counsel but was denied access to that office. He was allowed to speak by phone to that office from the reception desk at the VA. A paralegal for the Regional Counsel who intercepted this call, was informed by Robinett of the fraudulent and unlawful nature of this attempted invasion of his medical records but he declined to stop the release of the medical records. After that, the VA records custodian promised to notify Robinett once they received this unlawful court order prior to their releasing the

medical records, so that he could take legal steps to stop their release.

After receiving this unlawful ex parte order for Robinett's medical records along with documents containing attorney Buckley's fraudulent misrepresentations, this same paralegal authorized the release of Robinett's entire medical file to Mr. Buckley. Robinett's entire medical file was then released without any notification to Robinett as the VA had promised to do. Subsequently, Robinett began receiving crank harrassment phone calls in connection with his medical records.

Upon learning of this release, suit was filed in federal district court against the VA under 5U.S.C.sect.552a(g)(1)(D) of the Privacy Act. State Farm and Mr. Buckley were added as co-defendants under state law LSA-C.C. 2315 for invasion of privacy. In addition to damages, this suit seeks a protective, permanent injunction ordering return of the medical files because a request for return of the files was refused.

The federal district Judge incorrectly ruled that the files were discoverable and converted a Rule 12 motion to dismiss to one for summary judgment and dismissed the suit against the VA. Although finding that the VA had failed to notify Robinett of their release, the Judge side-stepped this violation of the statute by ruling Robinett was not adversely affected. No discovery had yet taken place. The claims against State Farm and Mr. Buckley were dismissed because there no longer was supplemental jurisdiction under 28 U.S.C. sect.

The Fifth Circuit in its de novo review, ruled that the regulations permit persons other than the Regional Counsel to release medical records. In affirming the decision to grant summary judgment, ruled that Robinett had failed to establish that the agency acted in an " intentional or willful " manner as required under 5 U.S.C. sect. 552a(g)(4). They further ruled there is no cause of action for failure to notify because the law does not require advance notification. They found no abuse of discretion in dismissing the other defendants.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHAT AGENCY ACTS SHALL BE DEFINED AS "INTENTIONAL OR WILLFUL" AS REQUIRED, TO RECOVER DAMAGES UNDER THE PRIVACY ACT.

The Privacy Act at 5 U.S.C. sect. 552a(g)(4) requires a litigant to prove that the agency acted in an "intentional or willful" manner before he may maintain a suit. (App. C at App. 7). The problem is, there is no uniform definition or standard among the circuits as to what acts consitutes "intentional or willful". Thus, actions which would warrant recovery in one circuit, may not in another.

There are a number of circuits that have defined "intentional or willful" as either committing the act without grounds for believing it to be lawful, or flagrantly disregarding others' rights under the Privacy Act. Mount v. United

Wilborn v. Department of Health & Human Servs., 49 F.3d 597, 602 (9th Cir.1995); Andrews v. Veterans Admin., 838 F.2d 418, 425 (10th Cir.), cert. denied, 488 U.S. 817, 109 S.Ct. 56, 102 L.Ed.2d 35 (1988); Sullivan v. Veterans Admin., 617 F.Supp. 258, 261 (D.C. Cir. 1985).

The Fifth Circuit is not one that has endorsed this definition of what agency actions constitutes "intentional or willful". Nor can any definition be found in the case history of this Circuit. That throws the door wide open for them to subjectively dismiss otherwise meritorious cases for failure to prove "intentional or willful" without saying why.

If the above definition of "intentional or willful" from these other circuits were applied to this case, then Petitioner has proven his entitlement to recovery under the Privacy Act. The facts of this case, established by pleading and affidavit, show that this paralegal who acted on his own to release the medical records knew in advance that the claim for these records was both unlawful and fraudulent because he was told that by Robinett. If he had any doubts, he should have investigated beyond just looking at the court order and documents sent to him by attorney Buckley. Or he could have talked to the Regional Counsel about it if he had any doubt since legal issues are involved?

Even the most cursory investigation would have told him that what Robinett had told him, was true. If for example, he had looked at the pleadings in the state case, it would have shown him that the claim for the documents was fraudulent. He would have seen that there was no claim for any personal injury which is contrary to what is claimed in the documents submitted by Buckley. The court order on its face could

easily be seen to be unlawful because it was an ex parte order for medical records which is unlawful under state law. La. R.S. 13:3715.1 B.(5); LSA-C.C.P. art. 963. Exactly what Robinett had warned him about.

Under Louisiana law medical records are privileged. La. R.S. 13:3734. There is an exception when a law suit is filed but only those medical files that are an "essential element" of the pleadings are discoverable. Arsenaux v. Arsenaux, 428 So.2d 427, 430; 65 Tulane Law Review 186. Never is an entire medical file discoverable. 49 Louisiana Law Review 742 [1989]; citing Williams v. Sistrunk, 417 So.2d 14, 16 (La. App. 4 Cir. 1982).

More importantly, the federal regulations governing the VAat 38 C.F.R. sect. 1.511 (c)(3)(ii) requires that the Regional Counsel conduct a thorough investigation to make sure that the state court order for the documents is legal and that the claim for the medical records is not fraudulent. This regulation clearly requires the Regional Counsel to oversee the entire investigation (App. C at App. 7). This paralegal, who is not the Regional Counsel, therefore, had no basis for believing that he could lawfully conduct this investigation on his own.

By disregarding the advance warning that the claim for the medical files was unlawful and fraudulent, this paralegal was showing flagrant disregard for the rights of Robinett to the privacy of his medical records under the Privacy Act. Those medical files are privileged by law. 38 U.S.C. Section 5701(a); Title 38 C.F.R. Section 1.500; La. R.S. 13:3734 B. Robinett has therefore proven this disclosure was "intentional or willful" under the definition applied by other circuits.

Thus, there is a need for a uniformity of this standard amongst all the circuits which these other circuits have applied since that does not appear to be the standard which the Fifth Circuit has applied to this case.

II. THIS COURT SHOULD DETERMINE IF THE FIFTH CIRCUIT COURT OF APPEAL MISCONSTRUED THE REGULATIONS.

The Code of Federal Regulations which governs the VA states that when a state court order is received for medical records, the Regional Counsel must determine whether the disclosure of these records is necessary to prevent the perpetration of fraud or other injustice. And if necessary, take additional steps to prevent their release. 38 C.F.R. sect. 1.511 (c)(3)(ii), (App. C at App. 7). The VA has admitted a paralegal authorized the release of Robinett's entire medical file.

The Fifth Circuit in their decision (App. A at A.pp. 3) ruled that this regulation contemplates that persons other than the Regional Counsel, such as employees that work at the Regional Counsel's office can make these determinations.

Since as shown above, under state law these medical records are clearly not discoverable and remain privileged, this decision made by the paralegal can be shown to be wrong. Wouldn't the Regional Counsel who is more experienced in the law have known better than to authorize their release?

Petitioner maintains that the Regional Counsel is named in this regulation for a reason. Since the VA had received a court order which has legal implications, the Congress of the United States has deemed that only the Regional Counsel should make these determinations. At the very least, he needs to oversee the matter as the regulation so states. Employees of the government agency don't have the legal experience to conduct a proper investigation and make these legal determinations.

III. THIS COURT SHOULD DETERMINE WHEN A FAILURE TO NOTIFY GIVES RISE TO AN ACTION UNDER THE PRIVACY ACT.

The Privacy Act at 5 U.S.C. sect. 552a(e)(8), as does 38 C.F.R. sect. 1.511(d), (App. C at App. 9) requires the agency to notify an individual when his records are being released. Robinett's affidavit proves he was not notified. The defendants have indirectly admitted to not notifying Robinett when releasing his medical records despite having promised him to do so, so that he could take legal steps to prevent their release. This was in line with the district Judge's findings, who found the VA routinely does not notify patients when releasing their medical records.

The Fifth Circuit Court of Appeals in their decision (App. A at App. 4) ruled that the law does not require advance notification in time for the subject to challenge the release. And therefore, the court felt this violation for failure to notify does not give rise to an action under 5 U.S.C. sect. 552a(g)(1)(D).

Nevertheless, petitioner maintains that despite there not

being a requirement of advance notification, a notification of some kind is still required under the law and there was none. A clear violation of the statute.

Moreover, since the agency had promised to notify Robinett in advance so that he could take legal steps to stop the release, they did have an obligation to notify in advance of the release. Their failure to make any notification, in violation of the Privacy Act at 5 U.S.C. sect. 552a(e)(8) therefore did have an "adverse effect" on Robinett so as to give rise to an action pursuant to 5 U.S.C. sect. 552a(g)(1)(D), (App. C at App. 7).

Had they notified as the affidavit shows they promised to do, this whole unlawful invasion of his medical records could have been obviated due to the fact that a writ of prohibition or other contradictory proceeding would have given him the opportunity to challenge the release. This likely would have succeeded since the court order for the release was unlawful under state law and the documents were not discoverable.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

Jerry L. Robinett, In Pro Se
15704 Chef Menteur Hwy.
New Orleans, Louisiana 70129
(504) 254-1431

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Jerry L. Robinett
Plaintiff-Appellant

v.

State Farm Mutual Automobile Ins. Co., Veterans Administration of U.S. Dept. of Veterans Affairs, and E. Ross Buckley, Jr.
Defendant-Appellees

No. 03-30376

Appeal from the United States District Court
for the Eastern District of Louisiana
Sarah S. Vance, District Judge
No. 02-CV-842-R

Summary Calender Decision: December 11, 2003

Before, Higginbotham, Davis and Prado, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ON BRIEF: Don M. Richard, for Appellant. Assistant United States Attorney, Kathryn W. Becnel, and E. Ross Buckley, Jr. for the Appellees.

Unpublished opinions are not precedent except for limited circumstances set forth in Local Rule 47.5.4.

OPINION

PER CURIAM.

Jerry L. Robinett, a non-prisoner, appeals the district court's grant of summary judgment for defendant State Farm Mutual Automobile Insurance Company (State Farm), the Veteran's Administration of the U.S. Department of Veteran's Affairs (VA), and E. Ross Buckley Jr., an attorney representing State Farm, and the dismissal of his claims for state law invasion of privacy against State Farm and Buckley, and Federal Tort Claims Act (FTCA), 28 U.S.C. 2671, and Privacy Act, 5 U.S.C. 552a claims against the VA.

The VA has filed a motion to dismiss the appeal, arguing that Robinett's notice of appeal was untimely because the district court did not have the authority to grant an extension of time for Robinett to file his motion for new trial. Based on the application of the unique circumstances exception recognized in Fairley v. Jones, 824 F.2d 440, 442 (5th Cir. 1987), we choose to exercise jurisdiction over this appeal. The VA's motion to dismiss the appeal is DENIED.

The district court granted the VA's motion to dismiss Robinett's FTCA claim because he had failed to exhaust his administrative remedies. Robinett does not address the district court's dismissal of his FTCA claim in his appellate brief, and so he has abandoned his FTCA claim. Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

Robinett argues that the VA violated federal regulations when a paralegal working at the Regional Counsel's Office authorized the release of his medical files. He contends that the regulations require the Regional Counsel to personally investigate the lawfulness and appropriateness of such an order. He bases his argument on 38 C.F.R. sect. 1.511(c)(3)(ii) which provides that the Regional Counsel determine whether the records should be released pursuant to a state court order. It is contemplated by the regulation that employees of the Regional Counsel "having reasonable knowledge of the requirements of this regulation" will be able to handle such requests. 38 C.F.R. sect. 1.511 (c) (3) (ii).

Robinett argues that he provided evidence, sufficient to defeat summary judgment, that the VA intentionally and willfully, and with flagrant disregard for his privacy, released his medical records. He contends that the district court erred in its determination that State Farm had a right to discover his medical records because they were relevant to the state court litigation. The state court issuing the order determined that his records were relevant, and the employees of the Regional Counsel, after reviewing the order and supporting documentation as required by the regulation, determined that the "disclosure of the records [was] necessary to prevent the

perpetration of fraud or other injustice in the matter in question." 38 C.F.R. sect 1.511 (c) (3) (ii). The medical records were then released pursuant to the exception for orders of a court of competent jurisdiction contained in 5 U.S.C. sect. 552a(b) (11). Robinett has not alleged any facts to preclude summary judgment which would show that the VA "acted in a manner which was "intentional or willful." 5 U.S.C. sect. 552(g)(4).

Robinett argues that the district court erred in its determination that the VA's failure to notify him of the release of his records did not adversely affect him. He contends that the records custodian led him to believe that he would have time to take legal action to prevent the release, which would have been successful because the release was unlawful. Blue brief, 19-20.

The regulations require the VA to make a reasonable effort to notify the subject that the records were disclosed under compulsory legal process. 38 C.F.R. sect. 1.511 (d). The regulations do not require the VA to inform the subject before the release in time for the subject to challenge the release. Robinett has not shown a violation of the notice regulation which would give rise to a cause of action under 5 U.S.C. sect. 552a (g) (1) (D). Robinett has not shown any error in the district court's grant of summary judgment for the VA on his Privacy Act claim.

Robinett argues that the district court erred in dismissing his claims against State Farm and Buckley by ruling that since it had dismissed all of his claims against the VA, it no longer had jurisdiction to hear the remaining state law claims. he contends that this is so because the district court erred in

dismissing his claims against the VA under the Privacy Act. He also argues that the claims are intertwined and that the district court had supplemental jurisdiction. Robinett has not shown that the district court abused its discretion in declining to exercise its supplemental jurisdiction over his state law claims. The district court had dismissed all of Robinett's federal claims. The district court did not err in granting summary judgment for the VA on the Privacy Act claims. The district court noted that his remaining state law claims were related to other state law claims currently pending in state court, which court was familiar with the background of the case. Robinett has not shown that the district court abused its discretion in declining to exercise supplemental jurisdiction. Cabrol v. Town of Youngsville, 106 F.3d 101, 110 (5th Cir. 1997).

Robinett argues that the district court erred in not granting his motion for a new trial under the Federal Rule of Civil Procedure 59. He repeats all of the arguments he made to show that the district court erred in dismissing his claims in the first place. The district court denied Robinett's motion because he had failed to offer any evidence or arguments that would merit reconsideration. His arguments in his motion merely reiterated the arguments the district court considered and rejected in its original rulings and were not addressed to the grounds for seeking Rule 59(e) relief. R. 6-9, 26-34. The district court did not abuse its discretion in denying his motion. Midland West Corp. v. FDIC, 911 F.2d 1141, 1145 (5th Cir. 1990).

AFFIRMED; MOTION TO DISMISS APPEAL DENIED.

APPENDIX B

UNPUBLISHED [Filed Dec. 8, 2002]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Jerry L. Robinett
Plaintiff-Appellant

v.

State Farm Mutual Automobile Ins. Co., Veterans Administration of U.S. Dept. of Veterans Affairs, and E. Ross Buckley, Jr.
Defendant-Appellees

No. 02-0842 - R

JUDGMENT

Considering the Court's orders and reasons on file herein,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered in favor of the United States Department of Veterans Affairs dismissing plaintiff's complaint with prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff's complaint against State Farm Mutual Automobile Insurance Company and E. Ross Buckley is dismissed without prejudice for lack of subject matter jurisdiction.

/s/ Sarah Vance
Sarah S. Vance, U.S.D.J.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Privacy Act - 5 U.S.C. sect. 552a (g) (1) (D) provides:

(g)(1) Civil remedies.--Whenever any agency

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,
the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Privacy Act - 552a (g) (4) provides:

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $ 1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

38 C.F.R. section 1.511(c)(3)(ii) provides:

(c) Disclosures in response to state or local court process--

(1) state or local court order.

(3) Where the disclosure provisions of paragraph (c) (1) or (2) of this section apply, disclosure will be made as follows:

(ii) In the absence of claimant disclosure authority, the Regional Counsel having jurisdiction must determine whether the disclosure of the records is necessary to prevent the perpetration of fraud or other injustice in the matter in question. To make such a determination, the Regional Counsel may require such additional documentation, e.g., affidavit, letter of explanation, or such other documentation which would detail the need for such disclosure, set forth the character of the pending suit, and the purpose for which the documents or records sought are to be used as evidence. The claimant's record may also be considered in the making of such determination. Where a court process is received, and the Regional Counsel finds that additional documentation will be needed to make the foregoing determination, the Regional Counsel, or other employee having reasonable knowledge of the requirements of this regulation, shall contact the person causing the issuance of such court process, and advise that person of the need for additional documentation. Where a court appearance is appropriate, and the Regional Counsel has found that there is an insufficient basis upon which to warrant a disclosure of the requested information, the Regional Counsel, or other employee having reasonable knowledge of he requirement of this regulation and having consulted with the Regional Counsel, shall appear in court and advise the court that VA records are confidential and privileged and may be disclosed only in accordance with applicable Federal regulations, and to further advise the court of such regulatory requirements and how they have not been

satisified. Where indicated, the Regional Counsel will take appropriate action to have the matter of disclosure of the affected records removed to Federal court.

5 U.S.C. sect. 552a (e) (8) provides:

(e) Agency requirements.--Each agency that maintains a system of records shall---

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

38 C.F.R. sect. 1.511 (d) provides:

(d) Notice requirements where disclosures are made pursuant to court process. Whenever a disclosure of Privacy Act protected records is made in response to the process of a Federal, State, or local court, the custodian of the records disclosed will make reasonable efforts to notify the subject of such records that such subject's records were disclosed to another person under compulsory legal process. Such notice should be accomplished when the process compelling disclosure becomes a matter of public record. Generally, a notice sent to the last known address of the subject would be sufficient to coply with this requirement.